

(19) (18) (19)  
Nos. 87-1622, 87-1697, and 87-1711  
Consolidated

Supreme Court, U.S.

FILED

NOV 4 1988

JOSEPH F. SPANIOL, JR.  
CLERK

Supreme Court *In The* of the United States

October Term, 1988

PHILIP BRENDALE,

*Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS  
OF THE YAKIMA INDIAN NATION, et al.,

*Respondents.*

STANLEY WILKINSON,

*Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS  
OF THE YAKIMA INDIAN NATION,

*Respondent.*

COUNTY OF YAKIMA, et al.,

*Petitioners,*

v.

CONFEDERATED TRIBES AND BANDS  
OF THE YAKIMA INDIAN NATION,

*Respondent.*

**BRIEF OF THE NAVAJO NATION  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

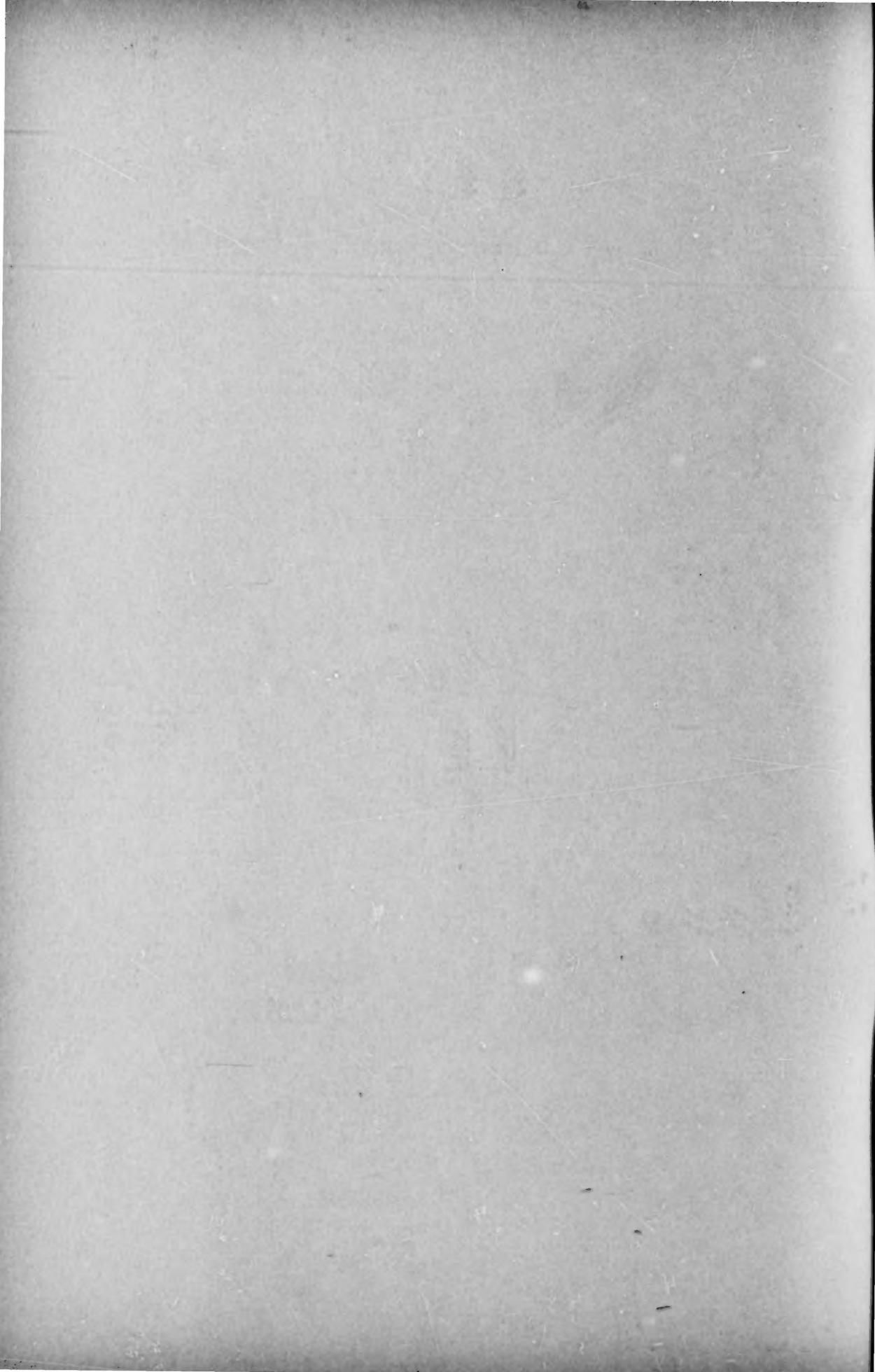
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## **INTEREST OF AMICUS CURIAE**

The Navajo Nation is a dependent Indian nation of the United States with approximately 173,000 citizens and a territory of nearly 25,000 square miles, located in the "Four Corners" area of the southwestern United States. Like the Yakima Nation, the Navajo Nation in the nineteenth century entered into treaties with the United States whereby the Navajo people ceded a substantial portion of their national territory and entered into a relationship of dependency with the United States. In return the United States guaranteed its protection of the Navajo people's right of self-government and the territory withheld from cession and reserved to the Navajo Nation. Treaty of September 9, 1849, 9 Stat. 974; Treaty of June 1, 1868, 15 Stat. 667.

The territory of the Navajo Nation has been expanded through the years by congressional and presidential action, and is now situated within the boundaries of three states: Arizona, New Mexico and Utah. Each of these States has created counties with boundaries which in part overlap the territory of the Navajo Nation.

Of the approximately 15.6 million acres of land within the boundaries of the Navajo Nation, approximately 618,000 acres are in fee ownership, and approximately 267,000 are owned by the Federal government, with the balance owned by the Navajo Nation. Of the lands owned in fee, approximately one-half are owned by non-Indians. These lands left tribal ownership as a result of the allotment process engendered by the 1887 General Allotment Act, as amended, 25 U.S.C. § 331 *et seq.*, and exhibit the familiar "checkerboard" pattern.

The Navajo Nation exercises exclusive land use regulatory jurisdiction over all lands within its boundaries to the exclusion of the neighboring state and county governments.<sup>1</sup> The right of the Navajo people to their homeland and to govern within that homeland is a retained original, natural right, guaranteed by federal legislation and the Nation's treaties with the United States.

The Navajo Nation wishes to present its views to this Court on three issues which have been raised in this case and which are of great concern to the Navajo people: the proper understanding of inherent tribal sovereignty, the proper construction of treaties of cession with Indian nations, and the effect of allotment era legislation on the retained powers of self-government of Indian people.

The Navajo Nation believes that the Petitioners' proposed construction of the Yakima Treaty and their proposed construction of the 1887 General Allotment Act are legally insupportable and threaten the rights reserved to the Navajo people under their treaties, as well as the reserved rights of other Indian nations.

The Navajo Nation therefore respectfully submits this brief as *amicus curiae* in order to assist this Court in its determination of these important issues.

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<sup>1</sup>The boundaries of the Navajo Nation within New Mexico are partly subject to dispute. Within these disputed areas, the state and county governments have asserted and exercised limited partial jurisdiction (over the objection of the Navajo Nation) concurrently with the Navajo Nation.

## SUMMARY OF ARGUMENT

When first encountered by Europeans, Indian people were sovereign under the same principles of natural law upon which our democratic form of government is founded. European powers, and later the United States, recognized the national character of the tribal governments they encountered, and conducted relations with the Indian nations through treaties.

Prior to the Yakima Treaty in 1855, the natural rights of Indian people to self-government and the national character of their governments was recognized and protected by federal legislation. Act of August 14, 1848, § 14, 9 Stat. 323; Act of June 5, 1850, ch. 6, § 5, 9 Stat. 437. By treaty on June 9, 1855, 12 Stat. 951, the Yakima people ceded a vast portion of their territory to the United States, reserving the territory now known as the Yakima Indian Reservation, and entered into a relationship of dependency with the United States. Reserved to the Yakima people, and vested in their government, the Yakima Nation, were full powers of self-government within their reservation, including full territorial jurisdiction. These rights were recognized and protected by the treaty provisions which placed the Yakima Nation under the protection of the United States and by which the United States reserved the Yakima Reservation to the Yakima people.

These inherent natural rights have never been impaired by Congress, neither by the 1887 General Allotment Act, as amended, 25 U.S.C. § 331 *et seq.*, nor by any other federal legislation. *Montana v. United States*, 450 U.S. 544 (1981), provides no principled support for Petitioners' position. That case is anomalous, for it incorrectly assumed certain facts, asked the wrong questions, re-

versed long-standing presumptions and rules of construction applicable to tribal rights, and disregarded controlling precedent.

This Court should continue to uphold and apply the time-honored understanding of Indian peoples' inherent political rights and the rules of construction applicable to Indian cession treaties and subsequent federal legislation.

For the foregoing reasons, the Ninth Circuit opinion upholding the Yakima Nation's jurisdiction in *Yakima Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), should be affirmed with directions to enter judgment in favor of the Yakima Nation.

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## **ARGUMENT**

### **I. The Issues in this Case Are Governed by the Proper Understanding of "Inherent Tribal Sovereignty" and the Proper Rules of Construction Applicable to Indian Cession Treaties and Subsequent Federal Legislation.**

The key to deciding this case lies in the proper construction of the 1855 Yakima Treaty and subsequent federal legislation. The proper construction of Indian treaties and the inherent rights reserved to Indian nations under those treaties must begin with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the cornerstone of the common law of the relationship of Indian nations to the United States and its constituent states. The proper construction of subsequent federal legislation later grew out of the principles established in that case.

The conflict in *Worcester* between the Cherokee Nation and the State of Georgia was fundamental. The

Cherokee Nation had been allied with the British during the Revolution, and after Britain's defeat had entered into a relationship of dependency with the United States by treaty. In 1829 the State of Georgia purported to extend its laws into the Cherokee Nation, which lay within the chartered boundaries of Georgia.

In deciding the case, the Court traced the political and legal status of Indian nations within Western law and practice, from the time of Europeans' first contact through the time of the Court's decision, relying during the colonial era on International custom and the practices of Great Britain and, after the Revolution, on federal policies, treaties and legislation. The Court found that from the beginning of relations with the various Indian nations of America, the colonizing European governments, and later the United States, had recognized the national character of the native governments they encountered. Consistent with principles expressed in this Nation's Declaration of Independence, this Court found that the Indian nations, when first encountered, possessed all the rights and authority of any sovereign nation as a matter of natural law.<sup>2</sup> *Worcester*, at 555, 559-561, 581-582.

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<sup>2</sup> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . .

*Worcester*, at 559. In *Worcester* and other decisions of the Marshall Court, however, this Court did hold that discovery had one important consequence: by convention the European nations had agreed that they would acquire vis-a-vis each other the exclusive right to maintain relations with the Indian nations within the particular territories which each nation had discovered. As Chief Justice Marshall explained, "It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it." *Id.* at 544.

Chief Justice Marshall, writing for the Court, went to great lengths to explain fully the proper construction of the Cherokees' treaties, *id.* at 551-556, and in particular the relationship contemplated by the provisions placing the Cherokee Nation under the protection of the United States. Marshall explained that “[t]his relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.” *Id.* at 555.<sup>3</sup>

Justice McLean, in his concurring opinion, queried

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. . . . *The only requisite is, that each of the contracting parties shall possess the right of self-government*, and the power to perform the stipulations of the treaty. . . .

*Id.* at 581 (emphasis supplied). As to how the language of treaties should be construed, he eloquently summarized the principles that had been applied by Marshall earlier in the opinion.

The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered

<sup>3</sup> These articles [of protection] are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence —its right to self-government, by associating with a stronger, and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State.

*Id.* at 560-561.

people, rather than their critical meaning, should form the rule of construction.

*Id.* at 582.

Both the majority and concurring opinions in *Worcester* also found support for their conclusions in federal legislation. Beginning shortly after the adoption of the Constitution, Congress had passed statutes designed to regulate trade and intercourse with the Indian nations. See, e.g., Act of June 30, 1834, ch. 161 4 Stat. 729 (codified as carried forward and amended in 25 U.S.C., ch. 5.) According to the Court, these acts treat Indian nations

as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, *within which their authority is exclusive . . .*

*Id.* at 556-557 (emphasis supplied). See also *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. 339, 347-348 (1941).<sup>4</sup>

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<sup>4</sup>The Worcester case was not, of course, the first time the Court had the opportunity to consider these issues. The previous year in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court had similarly articulated the status of Indian nations. In that case, Chief Justice Marshall characterized the Cherokees and other Indian nations who had entered into relationships of protection and dependency with the United States as "domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810) ("[t]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.") Justice Johnson, in dissent, urged that Georgia

(Continued on following page)

Until 1871, neither Congress, the Executive Branch nor this Court departed from the principles, analyses or holdings of *Worcester* and its precedents. See, e.g., *Mitchell v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Clark v. Smith*, 38 U.S. (13 Pet.) 195 (1939); *Chouteau v. Molony*, 57 U.S. (16 How.) 203 (1854); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

The year 1871 marked the first intrusion into tribal sovereignty when Congress forbade the President from entering into any further treaties with Indian nations, Act of March 3, 1871, 25 U.S.C. § 71,<sup>5</sup> and this Court in

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"had not a fee-simple in the land in question[,]” because the Indian tribes in question "retain a limited sovereignty, and the absolute proprietorship of their soil. . . . We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people . . ." and queried, "Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation?" *Id.* at 146-147.

Justice Johnson's understanding that the Trade and Intercourse Acts constituted an assertion of concurrent federal legislative jurisdiction was rejected by the Court 22 years later in *Worcester*, and his query concerning how a state could own "fee title" in lands owned by an Indian tribe was later answered in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). See also *The Seneca Lands*, 1 Op. Atty. Gen. 465, 467 (1821) (rejecting federal authority to intrude upon tribal lands without tribal consent); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-670 (1974) (explaining relationship between "naked" fee interest and original Indian title).

<sup>5</sup>The Act of 1877 saved the force and effect of all treaties previously made.

*The Cherokee Tobacco*, 78 U.S. (11 Wall.) 652 (1871), interpreted the 1868 Internal Revenue Act as having abrogated an Indian treaty by having directly imposed federal authority (a tax on tobacco and other products) within the Cherokee Nation.

Nevertheless, save only as was necessary to justify application of direct Congressional legislation into tribal territories, throughout this era the Court consistently continued to apply the principles of *Worcester*.<sup>6</sup> During this same era the Court clearly enunciated a corollary rule to *Worcester*, that Congressional legislation "should be liberally construed in [the Indians'] favor . . . ." *Choate v. Trapp*, 224 U.S. 665, 675 (1912):

[I]n the Government's dealings with the Indians the rule is . . . [that] the construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

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<sup>6</sup>See, e.g., *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *United States v. Kagama*, 118 U.S. 375 (1885); *Talton v. Mayes*, 163 U.S. 376, 384 (1895); *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Winters v. United States*, 207 U.S. 574 (1907).

The only exception was the Court's opinions, allowing limited state jurisdiction over the activities of non-Indians. See, e.g., *United States v. McBratney*, 104 U.S. 621 (1882); *Thomas v. Gay*, 169 U.S. 264 (1898).

*Ibid.* See also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Carpenter v. Shaw*, 280 U.S. 363, 366-367 (1930).

In recent years, the Court has continued to rely upon the principles and holdings in *Worcester* and its corollary rule. The Court has continued to uphold and rely upon the inherent natural law source of Indian people's right to self-government,<sup>7</sup> the doctrines of discovery and the reserved rights of Indian nations,<sup>8</sup> the recognition of original tribal rights by the Trade and Intercourse Acts,<sup>9</sup> the principles of treaty construction,<sup>10</sup> the corollary principles of statutory construction and treaty abrogation,<sup>11</sup> and the presumptive inapplicability of state law within Indian reservations, resulting from the preemptive effect

<sup>7</sup>E.g., *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 94 L.Ed.2d 10, 21 (1987); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *United States v. Mazurie*, 419 U.S. 544 (1975); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>8</sup>E.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985) (*Oneida II*), *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-674 (1974) (*Oneida I*); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Arizona v. California*, 373 U.S. 546 (1963); *Santa Fe Pacific R.R. Co. v. United States*, 314 U.S. 339 (1941).

<sup>9</sup>E.g., *Oneida II*; *Oneida I*; *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. at 347-348

<sup>10</sup>E.g., *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675-676 (1979), modified 444 U.S. 816 (1979); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>11</sup>E.g., *Solem v. Bartlett*, 465 U.S. 463 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

of Congress' sole authority to regulate commerce with the Indian tribes.<sup>12</sup>

These principles are in reality an expression of the Tenth Amendment principle of government by the consent of the governed. They remind us that Indian people, like the people of the states, are original sovereigns with inherent authority stemming from natural law, who ceded power to the federal government, and thus became diminished sovereigns, retaining all those powers they originally had prior to cession, less those actually ceded.<sup>13</sup>

These principles dictate that any analysis of the authority of the Yakima Nation to zone within its boundaries begin with the concept that, at the time of entering into their Treaty with the United States, the Yakima people possessed by natural law all the rights, powers and authority of a complete sovereign. *Worcester*, 31 U.S. at

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<sup>12</sup>E.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan*, 411 U.S. 164 (1973); *Warren Trading Post v. Arizona Tax Comm'n.*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>13</sup>Indeed, Congress is moving in the direction of treating Indian nations as states. See, e.g., Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11 (authorizing the Administrator of the EPA to "treat Indian Tribes as States" for purposes of the Safe Drinking Water Act, 42 U.S.C. § 300f et seq.); Water Quality Act of 1987, 33 U.S.C. § 1377 (authorizing the EPA Administrator to "treat an Indian tribe as a State" for purposes of many provisions of the Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 et seq.); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9626 (providing that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State" with respect to important provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq.).

555, 559-561, 581-582. Second, these inherent rights, powers and authority were Congressionally recognized and protected through the 1850 extension to the Oregon territory of the 1834 Trade and Intercourse Act.<sup>14</sup> *Santa Fe Pacific R.R. Co.*, 314 U.S. at 347-348. Third, by entering into the Treaty with the Yakima Nation, the United States implicitly recognized the Yakima people's inherent right to self-government. *Worcester*, 31 U.S. at 559-560, 581. Fourth, the Yakima Treaty constituted "not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted." *United States v. Winans*, 198 U.S. at 381 (construing the Yakima Treaty); *Northern Pacific Railway v. United States*, 227 U.S. 355, 366 (1913). Fifth, the Treaty must be construed as the Yakima Nation understood it. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. at 174; *Jones v. Meeham*, 175 U.S. at 10-11. Sixth, where a Treaty provision or its understanding by the Yakima Nation appears ambiguous, the ambiguity must be resolved in favor of the Yakima Nation. *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 675-676. Seventh, only Congress has the authority to impair the rights, powers and authority reserved to the Yakima people in their Treaty. *Solem v. Bartlett*, 465 U.S. at 470.<sup>15</sup> Eighth, in case of any conflict between the rights, powers and authority reserved to the Yakima people by their Treaty and the pro-

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<sup>14</sup>Act of 1850, ch. 16, § 5, 9 Stat. 437.

<sup>15</sup>Since Indian people were made United States citizens by the Act of June 2, 1924, ch. 233, 43 Stat. 253, the Ninth and Tenth Amendments should now operate to prevent even Congress from adversely affecting Indian people's right to self-government. See generally, R. Barsh & J. Henderson, *The Road: Indian Tribes and Political Liberty* 257-269 (1980).

visions of a subsequent Act of Congress, the subsequent statute must be construed to avoid impairment of the prior Yakima Treaty. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Finally, “[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power remains intact.” *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. at —, 94 L.Ed.2d at 21, quoting from *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149, n. 14.

## **II. Federal Legislation and the Yakima Treaty Guarantee the Yakima People the Right to Complete Self-Government, Including Full Territorial Jurisdiction Within the Yakima Reservation.**

In 1848 Congress created the territorial government of Oregon (within the boundaries of which the present State of Washington as well as the Yakima Nation are located). Act of August 14, 1848, 9 Stat. 323. Not only did section 1 of the Act include a savings clause protecting existing tribal rights, but section 14 extended to the Oregon territory the protections contained within the Northwest Ordinance of 1787, Art. III.<sup>16</sup>

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<sup>16</sup>The Northwest Ordinance ordains and declares:

as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, . . . [t]he utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . .

(As re-enacted by the Act of August 7, 1789, ch. 8, 1 Stat. 50; emphasis supplied.)

Two years later Congress extended the provisions of the 1834 Trade and Intercourse Act over the Oregon Territory, and authorized the negotiation of cession treaties with certain Indian nations. Act of June 5, 1850, ch. 16, §§ 5 & 1, 9 Stat. 437. Pursuant to that authorization, five years later on June 9, 1855, the United States government and the Yakima Nation concluded a treaty at Camp Stevens, Washington, 9 Stat. 951, whereby the Yakima people ceded to the United States a large portion of their territory (article 1), and placed themselves under the protection of the United States as a dependent nation (article 8). Reserved from that cession was a tract of territory now commonly referred to as the "Yakima Indian Reservation" (article 2).

An analysis of the Treaty and preceding federal legislation amply demonstrates that complete territorial jurisdiction within the Yakima Reservation is reserved to and recognized in the Yakima Nation, subject only to the Treaty provisions themselves. Prior to the Treaty, the Yakima Nation possessed all the power and authority of an international state, for "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights[.]" *Worcester*, 31 U.S. at 559. These rights were further confirmed and protected by the extension of the Northwest Ordinance of 1787 to the Oregon territory in 1848, and by the extension of the 1834 Trade and Intercourse Act to the

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The Act of March 2, 1853, § 5, 10 Stat. 172, creating the Territorial Government of Washington out of a portion of the old Oregon Territory, saved the force and effect of the 1848 Oregon Organic Act, where not superceded.

Oregon territory in 1850. Further, the fact that the Treaty is a "treaty" recognizes the fact that at the time they entered into the Treaty, the Yakima people possessed all the usual powers of self-government of an international state.<sup>17</sup>

The inherent governmental powers held by the Yakima people prior to the Treaty were retained within the Yakima Reservation. The Yakima people did not cede any of their inherent natural "right, title and interest" in and to the lands and country now called the Yakima Reservation: they "reserved" them from the cession, and this was "a reservation of those [rights] *not granted.*" *Winans*, 198 U.S. at 381 (construing the Yakima Treaty; emphasis supplied).

When the Yakima people "acknowledge[d] their dependence upon the Government of the United States.]" they entered into a relationship of "dependency" with the United States, similar to the relationship of protectorate or dependency characteristic of the British Empire. Inherent and guaranteed in this relationship is the right of the Yakima people to self-government. *Worcester*, 31 U.S. at 560, quoted *infra* at footnote 3.

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<sup>17</sup>See *Worcester*, 31 U.S. at 581-582 (McLean, J., concurring.) The Constitution does not distinguish between treaties made with foreign nations and those made with Indian nations. U.S. Const. art. II, § 2, cl. 2. This was not a mere oversight, for the practice of entering into treaties with Indian nations was well established at the time the Constitution was formed. See, e.g., Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. See also *Worcester*, 31 U.S. at 559-560 ("The constitution . . . admits [Indian nations'] rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language . . . We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.") (Emphasis supplied.)

In addition to the protection afforded by the 1848 Oregon Organic Act and the Act of 1850, in the Yakima Treaty the United States “set apart . . . [the tract of land not ceded] for the exclusive use and benefit of said [Yakima Nation], as an Indian reservation.” In other words, not only did the Yakima people reserve to themselves their pre-existing rights within the retained area, but the United States reserved to them their rights as well.<sup>18</sup>

In 1855 when the Yakima treaty was concluded (and in 1859 when it was ratified) neither Congress, the Executive Branch, nor this Court had departed from the analysis, principles or holdings of *Worcester*. Given the common law legal status of Indian nations at that time, protected by federal legislation, and applying the proper rules of construction to the Yakima Treaty, the inescapable conclusion is that, at the time when the relationship between the United States and the Yakima Nation was formed, the Yakima Nation possessed *full territorial jurisdiction* within its reserved territory, which territory and jurisdiction were *protected and guaranteed* by federal legislation and the Yakima Treaty.

### **III. Petitioners' Reliance on the 1887 General Allotment Act is Misplaced, and Montana v. United States Lends No Principled Support to Their Position.**

Petitioners erroneously urge that the 1887 General Allotment Act and the policies behind that Act divested the Yakima Nation of general territorial jurisdiction, at least with respect to non-Indian activities on non-Indian owned lands. However, Petitioners are unable to point to

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<sup>18</sup>Territory withheld from cession by an Indian nation is not necessarily reserved by the Federal government. See, e.g., *United States v. Holt State Bank*, 270 U.S. 49, 58 & n.1 (1926).

any provision of the 1887 Act, or of any allotment era legislation, to support their contentions. In fact, there is no piece of general legislation from the allotment era that even addresses the jurisdiction of tribal governments, much less purports to divest tribal governments of general territorial jurisdiction.<sup>19</sup> Petitioners' entire position instead depends upon the statements made by the Court in *Montana v. United States*, 450 U.S. 544 (1981).

*Montana* was a curious case, for it formulated and applied tests which had never been applied before and have never been applied by this Court since. Two issues were presented in *Montana*: the extent of the Crow Tribe's jurisdiction over hunting and fishing by non-Indians on non-Indian or State-owned land within the aboriginal Crow Reservation, and the ownership of the navigable Big Horn River within that Reservation.

In the Treaty of Fort Laramie of 1851, 11 Stat. 749, the United States and various signatory tribes, including the Crow Tribe, acknowledged designated lands as the

<sup>19</sup>Petitioner Brendale cites section 6 of the 1887 Act, 25 U.S.C. § 349 as having accomplished this result. Section 6 provided in part that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside[.]". Obviously, this provision does not speak to the issue of tribal jurisdiction and is no more inconsistent with retained tribal jurisdiction than is Public Law 280, 18 U.S.C. § 1162; 28 U.S.C. § 1360. See, e.g., *California v. Cabazon Band*, 480 U.S. 202 (1987). Cf. *Talton v. Mayes*, 163 U.S. 376 (1895) (Tribal prosecution for an Indian-Indian murder, after that crime was made a federal criminal offense by the Major Crimes Act of 1885, as amended, 18 U.S.C. § 1153).

Congress knows how to divest tribal jurisdiction when it wanted to. See, e.g., Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495 (expressly abolishing tribal courts in the Indian territory).

territories of the respective Indian nations. In the Treaty with the Crows at Fort Laramie in 1868, 15 Stat. 649, the Crow Tribe ceded to the United States all but 8 million acres of their territory, which both parties agreed were to be set apart for the "absolute and undisturbed use and occupation" of the Crow Tribe. Subsequent cession agreements and an act of Congress reduced the reservation to slightly less than 2.3 million acres.

Prior to *Montana*, this Court repeatedly had recognized that cession treaties with Indian nations were not a grant of rights to the Indians, but a grant of rights from them. Although the Crow Reservation is an original Indian title reservation, reserved from cession to the United States, to which the United States therefore held only a "naked" fee interest, the *Montana* majority considered the appropriate question to be

whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, . . . or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.

450 U.S. at 550-551. The majority incorrectly *assumed* that the United States held a fee-simple absolute estate in the lands owned by the Crow Tribe at the time of the 1851 and 1868 Treaties. The appropriate question therefore became to whom had the federal government subsequently conveyed title.<sup>20</sup> The remainder of its analysis was a

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<sup>20</sup>That the Crow Tribe did in fact have original Indian title to the lands in question at the time of the 1868 Treaty had previously been litigated between the Crow Tribe and the United States, with judgment in favor of the Crow Tribe. *Crow Tribe v. United States*, 284 F.2d 361 (Ct. Cl. 1960), cert. denied, 366 U.S. 924 (1961).

search in vain for a conveyance *to* the Crow Tribe in instruments that were instead conveyances *from* the Tribe.<sup>21</sup>

This same analytical error also undermined the analysis of the Crow Tribe's regulatory jurisdiction. Justice Stewart again *assumed* that any authority the Crow Tribe might have must stem from a federal grant. Again ignoring the proper construction of cession treaties as a grant *from*, not *to*, the Indian nations, the *Montana* Court

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<sup>21</sup>The majority chiefly relied upon two cases which had involved questions of ownership of submerged lands within Indian reservations. The *Montana* court placed great emphasis on *United States v. Holt State Bank*, 270 U.S. 49 (1926), which it read as having "reject[ed] an Indian tribe's claim of title to the bed of a navigable lake," which lay "wholly within the boundaries of the Red Lake Indian reservation, which had been created by treaties entered into before Minnesota joined the Union." 450 U.S. at 552. "The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." 450 U.S. at 553.

Unfortunately, this heavy reliance on *Holt State Bank* was completely misplaced. The Chippewa Tribe did *not* claim title to the lands in that case; they had ceded them to the United States more than thirty-five years before the case was decided. Instead, the United States claimed that it held the land under the terms of the cession agreement, where it had promised to dispose of the ceded lands at a stated price and deposit the proceeds into a trust account for the Chippewa Tribe. *Holt State Bank*, 270 U.S. at 52. *Holt State Bank* simply held that the terms of the cession agreement could not affect the prior rights of the holder of the preemption right ("naked fee") in the ceded lands. Conveyance of the naked fee by the United States to the State of Minnesota prior to the Chippewa cession had conveyed the entitlement to have complete title after the Chippewa Tribe's rights were relinquished. After cession by the Chippewa Tribe, the right to possession immediately attached to the naked fee. This rule is rooted in the discovery doctrine and had been previously applied by this Court in, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 525-526 (1877). See also *Worcester*, 31 U.S. at 543-545. Essentially, the rule is that of "deed by estoppel." The rule

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thought it was important that “[t]he [Crow] treaty nowhere suggested that Congress intended to grant author-

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was again applied in 1941 in *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. 339. Cf. *County of Oneida v. Oneida Nation*, 470 U.S. 226 (1985).

Furthermore, *Holt State Bank* does not even support *Montana's* holding that the terms of the Crow treaties did not overcome a presumption against conveyance by the United States of its naked fee title to the Crow Tribe. *Holt State Bank* had expressly relied upon the fact that there "was no formal setting apart of what was not ceded" in the Chippewa treaty at issue, taking care to distinguish it from another treaty reserving lands of other Chippewa bands. 270 U.S. at 58 & n.1. In other words, although the Chippewa Tribe had reserved its interest at the time the reservation had been created, the United States had not. This left the naked fee free to pass to the State upon its admission to the Union. By contrast, the 1868 Crow Treaty in *Montana* had expressly declared that the unceded Crow lands were set apart for their "undisturbed use and occupation." 450 U.S. at 553.

The other case chiefly relied upon by the *Montana* majority, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), is totally inapposite to the situation in *Montana*. *Choctaw Nation* upheld the Choctaws' claim of complete title to submerged lands under its removal treaty with the United States, wherein the Federal government had conveyed to the Choctaw Nation lands outside of the Choctaws' aboriginal domain in return for the cession to the United States of the Choctaws' entire aboriginal territory. Nevertheless, in his concurring opinion Justice Stevens read *Choctaw Nation* for the proposition that "the strong presumption against dispositions by the United States of land under navigable waters in the territories . . . applie[s] to Indian reservations." 450 U.S. at 567-568. Of course, the presumption only applies to grants; and while the Choctaw Reservation in *Oklahoma* was created by a grant from the United States, the Crow Reservation was "created" by the Crow Tribe having withheld lands from sale to the United States.

A more in depth analysis of *Montana's* problem with correctly construing and applying prior precedent with respect to land ownership can be found in Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 Wash.L.Rev. 627 (1981).

ity to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands.” 450 U.S. at 558. The problem, of course, is that the Crow Tribe, like other Indian nations, had pre-existing inherent authority at the time of the 1868 cession treaty, and needed no such federal grant.<sup>22</sup>

The Court admitted that the Treaty “arguably conferred upon the Tribe the authority to control fishing and hunting on [Reservation] lands[,] . . . [b]ut that authority could only extend to land on which the Tribe exercises ‘absolute and undisturbed use and occupation.’ . . . If the 1868 Treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.” 450 U.S. at 558-559 (footnotes and citations omitted).<sup>23</sup> The Court referred to the 1887 General Allotment Act and the 1920 Crow Allotment Act, 41 Stat. 751, to support this novel proposition. 450 U.S. at 559-561, n.9.

<sup>22</sup>Crow territory and authority had been recognized and protected by the Federal government prior to the 1868 Treaty by the 1834 Intercourse Act, which applied of its own force.

<sup>23</sup>In other words, the power conferred was that of a private landowner. Such tentativeness is strange considering that the Crow Tribe already owned such lands. See *infra*, fn. 20.

Montana’s and Petitioners’ assertion that tribal jurisdiction is grounded in such “absolute and undisturbed use and occupation” language confuses governmental jurisdiction with property ownership, and is a misconception of cession treaties. Such jurisdiction is grounded in natural law, delegated by the Indian people to their governments, and reserved to them by having not been granted away. Montana’s reliance upon *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), is unfounded: in that case it was the fact that off-reservation fishing rights were to be exercised “in common” with non-Indians that led the Court to conclude that on-reservation jurisdiction over fishing must be concurrent.

At footnote 9 the *Montana* majority again simply ignored the long-standing rules of construction applicable to tribal rights: if the Crow Tribe had treaty-protected inherent authority prior to the Allotment Acts, the proper question was whether Congress intended to take that authority away, *not* whether Congress intended the Crow Tribe to have it. The fact that “the allotment policy was designed to *eventually* eliminate tribal relations[,]” *ibid.* (emphasis supplied), does not support the proposition that Congress did. The proper test to apply to determine whether Congress intended a divestiture is whether Congress “explicitly indicate[d]” or “clearly evince[d]” such an intent. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), quoting from *United States v. Celestine*, 215 U.S. 278, 285 (1909) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977). Absent such “substantial and compelling evidence of a congressional intention to diminish “tribal authority, the Court should be “bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place[.]” *Solem*, 465 U.S. at 472.

Further, the concept that conveyances of private property interests also convey immunity from governmental authority is foreign to western law. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906), decided at the height of the allotment era, and paradoxically cited by the *Montana* Court for support, explained that such a theory “is too unique and anomalous to invoke assent.” 135 F. at 950. “[T]he jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land they occupy in it, . . . nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.” 135 F. at

951-952. Later, the Circuit Court again addressed the issue, quoting from 23 Op.Atty.Gen. 214, that "the legal right to purchase land within an Indian nation *gives to the purchaser no right of exemption from the laws of such nation.* . . ." 135 F. at 953 (emphasis supplied).

Turning to the question of inherent tribal authority, Justice Stewart simply declared, without citation to authority, that "'inherent sovereignty' is not so broad as to support the application of [the Crow Tribe's hunting and fishing regulations] to non-Indian lands." 450 U.S. at 563. The only explanation offered was based upon this Court's recent opinions in *United States v. Wheeler*, 435 U.S. 313 (1978) and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Unfortunately, although the majority quoted from *Wheeler* and discussed *Oliphant*, it neither mentioned nor applied the test formulated in those cases.

*Oliphant* had held that tribal governments had impliedly been divested of certain powers, but only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . ." *Washington v. Confederated Colville Tribes*, 447 U.S. 134, 154 (1980). The majority attempted no such analysis of possible overriding federal interests, simply assuming that

the principles upon which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

450 U.S. at 555.<sup>24</sup>

<sup>24</sup>This Court recently rejected such an extension of *Oliphant* in another case involving the extent of the Crow Tribe's jurisdiction.

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The majority apparently assumed without explanation that there is an overriding federal interest in divesting tribal governments of all authority over non-Indians.<sup>25</sup> Rather than an analysis of how, when and why tribal governments might have lost their preexisting authority, the new *Montana* test assumes that they have lost that authority unless an analysis of tribal interests supports its retention.

None of the cases cited by the majority as support for its new test had ever mentioned or applied such a test. Indeed, a careful review of each of those cases reveals no holdings and virtually no language which support the propositions for which they were cited.

As support for the proposition that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," 450 U.S.

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diction over non-Indians on non-Indian lands. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-856 (1987). Significantly, this Court did not apply the *Montana* test in that case. See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

<sup>25</sup>The *Montana* majority found support for this proposition in Justice Johnson's "concurrence" in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" 450 U.S. at 565 (quoting *Oliphant*, 435 U.S. at 209). Of course, Justice Johnson actually was dissenting in *Fletcher*, and his opinion did not say that tribes had lost "any right" of governing other persons. Johnson merely thought that the Trade and Intercourse Acts were a federal assertion of concurrent jurisdiction, *Fletcher*, at 146-147, and his views obviously did not have the support of the majority of the Court, and were later rejected by both this Court and the Executive Branch. See, e.g., *Worcester*, 31 U.S. at 556-557; *The Seneca Lands*, at 467.

at 564, the majority cited to portions of four cases, three of which, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), and *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 171 (1973), were merely analyzing the extent of state authority over Indian affairs under the "infringement" test. The fourth, *United States v. Kagama*, 118 U.S. 375, 381-382 (1885), was a case upholding a federal prosecution on a California Indian reservation, which had briefly mentioned that Indian tribes had "the power of regulating their internal and social relations."

As support for the proposition that a tribal government may regulate non-Indian conduct on non-Indian lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe[,"] 450 U.S. at 566, the majority again cited to the "infringement" test language in *Williams v. Lee*, 358 U.S. at 220, and in *Fisher v. District Court*, 424 U.S. 382, 386 (1976), which were merely analyzing the extent of state authority within Indian reservations. The two other cases cited, *Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 (1906) and *Thomas v. Gay*, 169 U.S. 264, 273 (1898), were simply cases upholding territorial taxes on non-Indians within Indian reservations.

Finally, to support the proposition that a tribal government may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members," 450 U.S. at 565, the Court cited to four cases, each of which is merely an example of where non-Indians *had* entered into such consensual relationships. *Morris v. Hitchcock*, 194 U.S. 384 (1904), had upheld a tax of the Chicka-

saw Nation on non-Indians, but never relied upon "consensual relationships" to support its holding. *Buster v. Wright*, 135 F. at 950, upheld a tax by the Creek Nation on non-Indians, but its analysis completely conflicted with the analysis in *Montana*. The Court in *Buster* rejected the theory that jurisdiction follows land titles, and declared that

[E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

135 F. at 950. *Williams v. Lee*, 358 U.S. at 223, concerned the extent of state authority in a case where a non-Indian was trading on an Indian reservation. Finally, while *Washington v. Confederated Colville Tribes*, 447 U.S. 134, does contain some language arguably supporting *Montana*, that case applied the *Oliphant* test which the *Montana* Court ignored.

From reading the cases relied upon by *Montana*, it is apparent that all but three involved only questions of state, not tribal, authority, and the three which did involve tribal authority upheld it under analysis at variance with *Montana's*. At most, those cases are simply examples of results that would be the same under the *Montana* test. What is most disturbing is the apparent reliance on the "infringement" test of *Williams v. Lee* to determine the extent of tribal, rather than state, authority. The majority apparently used a test designed to *protect* tribal government from extensions of state authority to *restrict* tribal government.

## CONCLUSION

Self-government for Indian people is the principle means by which they are able to protect their distinct cultures from being subsumed by the majority culture. Tribal reservations are the last vestige of the vast domain and cultural freedom that Indian people enjoyed prior to European contact. In order for the dominant culture to flourish, Indian people ceded the vast majority of that domain, and agreed to be incorporated into the majority government, but only in return for guarantees of retained territory and self-government. If those retained rights are denied them, then their cultures will perish, and this Nation will have destroyed a source of incalculable inspiration and enrichment.

The time-honored rules of treaty and statutory construction must be applied in this case to the Yakima Treaty and the rights retained by and guaranteed to the Yakima people under that Treaty. Tribal territory is not defined by land titles, but by boundaries. Indian people's right to choose their own government arises from and is as sacred as the same natural rights held by the people of the states.

Nations differ from each other in condition, and that of the same nation may change by the revolutions of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

*Worcester*, 31 U.S. at 583. (McLean, J., concurring.)

Petitioners' reliance upon *Montana* is an attempt to bootstrap themselves into a legal position that has no principled support. The entire *Montana* analysis suffers from

asking the wrong questions, reversing established presumptions, and disregarding controlling precedent. That this Court recognizes the weakness of *Montana's* analysis is suggested by the fact that this Court has never again applied *Montana* in another case.

The Navajo Nation respectfully urges that this Court expressly overrule the *Montana* decision. *Montana* breeds uncertainty and endless litigation. The solution, however, is not to adopt the test based on land tenure classification proposed by Petitioners, but to leave questions of tribal jurisdiction to Congress, where they properly belong. U.S. Const., art. I, sec. 8.

This Court should adopt in this case a rule which requires a clear, plain and unequivocal expression from Congress that it intends to alter the jurisdictional pattern on an Indian reservation before this Court will find such a change to have occurred. Congress is well able to regulate and define the contours of jurisdiction within Indian reservations in a manner which is responsive to local needs. This Court has allowed Congress virtually unlimited authority over Indian nations and their territories. It should now leave to Congress the task of exercising that authority.

For the foregoing reasons, the decision of the Ninth Circuit upholding the Yakima Nation's jurisdiction should

be affirmed with direction to enter judgment in favor of the Yakima Nation.

Respectfully submitted,

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November 4, 1988